



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 14, 1998

Ms. Linda Wiegman  
Supervising Attorney  
Office of General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR98-3085

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120466.

The Department of Health (the "department") received a request for information regarding "Columbia East Houston / formerly Sunbelt Regional Medical Center." You say that you have released most of the responsive information to the requestor. You ask, however, whether certain portions of the information must be withheld under section 552.101 of the Government Code.<sup>1</sup>

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<sup>1</sup>The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

You received the request for information on September 9, 1998. You did not seek a decision from this office until September 24, 1998. Consequently, you have not met your statutory burden. Gov't Code 552.301. The requested information is therefore presumed public. You have, however, demonstrated that some of the requested information is confidential by law. Thus, we will consider what information must be withheld from the requestor. Please note, however, that we do not consider your claims under the informer's privilege, since you waived this exception by failing to request our decision in a timely fashion. See Open Records Decision No. 549 (1990).

Section 552.101 requires withholding "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Texas Medical Practice Act, V.T.C.S. article 4495b provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b, § 5.08(b). You have marked portions of the information at issue which you say are derived from medical records. Section 5.08(j)(3) of the article requires that any subsequent release of medical records be consistent with the purposes for which the department obtained the records. Open Records Decision No. 565 at 7 (1990). Based on your representations, we agree that you must withhold under article 4495b the material you have so marked. We have also marked additional portions of the information which in our opinion must be withheld under these provisions.

Section 261.201(a) of the Family Code provides:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect [of a child] made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, *the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.* [Emphasis added.]

You have marked information you claim is subject to section 261.201(a). You advise that department rules provide for limited release of information subject to the section but do not allow release to the requestor here. See 25 T.A.C. § 1.207. We agree that you must withhold the material you have marked as subject to section 261.201(a).

Chapter 48 of the Human Resources Code provides for the authority to investigate the abuse, exploitation, or neglect of an elderly or disabled person and to provide protective services to that person." Section 48.101(a) makes confidential

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

You have marked information you claim is subject to section 48.101(a). You advise that department rules provide for limited release of information subject to section 48.101 but do not allow release to the requestor here. *See* 25 T.A.C. § 1.207. None of the exceptions to confidentiality set out in section 48.101 appear to apply to the requestor here either. We agree that you must withhold the information you have marked as subject to section 48.101(a).

Section 81.103(a) of the Health and Safety Code makes HIV "test results" confidential, with exceptions which do not apply here. "Test result" is defined as "any statement" that an identifiable individual has been tested for HIV or is positive negative, at risk, or "has or does not have a certain level of antigen or antibody." Health & Safety Code § 81.101 (5). You have marked information as subject to section 81.003(a). You must withhold this material as well as other portions we have marked as also being subject to section 81.103(a).


You note the information at issue contains certain patients' social security numbers. Section 405(c)(2)(C)(vii)(I), title 42, of the United States Code prohibits the release of social security numbers that are obtained or maintained . . . pursuant to any provision of law, enacted on or after October 1, 1990. *Id.* As was indicated in Open Records Decision No. 622 (1994), governmental bodies must determine under what authority they obtained particular social security numbers and the effective date of those laws. You identify sections chapter 241 of the Health and Safety Code and "Tex. Government Code, §441, Subchapter L" [sic] as the laws pursuant to which the social security numbers at issue are obtained by the department. To the extent that the social security numbers in question were indeed obtained by the department pursuant to laws enacted after October 1, 1990, you must withhold such numbers under section 405(c)(2)(C)(vii)(I), title 42 of the United States Code.

We note that the information at issue also identifies certain individuals as participating in Medicare or Medicaid programs. The identities of Medicare and Medicaid patients are made confidential by federal law. *See* Open Records Decision No. 487 (1988) (names of Medicare and Medicaid patients must be withheld in accordance with 42 C.F.R. § 401.126). We have marked the Medicare and Medicaid information you must withhold.

Finally, you submit that portions of the information at issue must be withheld under common-law privacy. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. We have examined the records at issue and do not find any information therein which must be withheld under common-law privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



William Walker  
Assistant Attorney General  
Open Records Division

WMW/ch

Ref: ID# 120466

Enclosures: Marked documents

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(w/o enclosures)